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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

THE COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit *sub nom. United States of America* v. *Mary Akin, et. al.,* is reported at 504 F.2d 115 (1974). This opinion reversed the opinion and order of the United

States District Court for the District of Colorado which was issued orally and is unreported. Both opinions are reproduced as appendices in the petitions for writs of certiorari (see Pet. App. No. 74-940, 1a, 17a; Pet. No. 74-949, App. A, p. 19, App. B, p. 34)[1] and accordingly are not reprinted in the Single Appendix (A.).

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* by petitioners (A. 16) was denied on November 12, 1974 (A. 27). The petitions for writs of certiorari were filed in this court on January 30, 1975 (No. 74-940) and February 1, 1975 (No. 74-949). Certiorari was granted in both petitions and the cases consolidated on April 28, 1975 (421 U.S. —; A. 30). The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the court of appeals err in reversing the exercise of discretion by a federal district court to decline on the grounds of abstention and comity to exert jurisdiction over a suit by the United States for the adjudication of Federal claims to a portion of the same waters involved in a pending state water court adjudication in which the United States had been joined pursuant to the McCarran Amendment (43 U.S.C. 666)?

2. Did Congress intend in the McCarran Amendment that general water rights adjudications, such as are involved here, be conducted in state proceedings?

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[1] Unless noted to the contrary Pet. App. references herein are to the appendix in the petition in No. 74-940.

STATUTES INVOLVED

The immediate federal statutory provision involved is 43 U.S.C. 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, which provides:

§ 666. *Suits for the adjudication of water rights—Joinder of the United States as defendant; costs*

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

Service of Summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Joinder in suits involving use of interstate streams by State

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in

> any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.

Also involved is the Water Rights Determination and Administration Act of 1969, article 92 of title 37, C.R.S. 1973, as amended (commonly and hereinafter referred to as the 1969 Act), which provides a complete system for the adjudication and administration of the waters of the natural streams in the State of Colorado. Pertinent provisions of the 1969 Act are contained in the Petition in No. 74-949, Appendix C, pp. 42-63.

Both the McCarran Amendment and the 1969 Act as well as the Colorado adjudication act in effect prior to 1969 were construed by this Court in 1971 in *Eagle County* and *Water Division 5*.[2]

STATEMENT OF THE CASE

In accordance with this Court's March 1971 opinions in *Eagle County* and *Water Division 5*, the United States thereafter set forth all of its claims to the use of water, including claims to appropriative and reserved rights, in three of Colorado's seven water divisions (Divisions 4, 5 and 6), where adjudications were ongoing and in which the Government had been served under the McCarran Amendment. Although similar

[2] *U. S.* v. *District Court in and for the County of Eagle, State of Colorado, et al.*, 401 U.S. 520 (1971); *U. S.* v. *District Court in and for Water Division No. 5, State of Colorado, and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof*, 401 U.S. 527 (1971), herein *Eagle County* and *Water Division 5*, respectively.

proceedings had likewise been underway since October 1970 in Water Division 7, the United States nevertheless instituted its own suit[3] on November 14, 1972, in the United States District Court in Denver, some 300 miles distant from the Water Court in Water Division 7, involving waters within the jurisdiction of the latter court. This suit, against some 1000 named water users and unnamed others, seeks to have declared and determined all of the federal claims to the use of the waters of the "Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado,"[4] which constitute only a part of the waters of Water Division No. 7. These rivers are within the San Juan Basin and are tributary to the Colorado River System.[5]

On December 22, 1972, the Government was served under the McCarran Amendment in the Water Division

[3] A copy of the complaint is reprinted at Pet. App. 21a. Jurisdiction was asserted under 28 U.S.C. 1345, which provides in pertinent part:

> *Except* as otherwise provided by Act of Congress the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . (emphasis supplied).

[4] See Complaint, Pet. App. 30a and Map of Water Division 7 at Pet. App. 41a.

[5] The upper Colorado River and its principal tributaries (except for the Green River) originate within Colorado. The annual average outflow from the State amounts to approximately 80% of the river's flow at Lee Ferry, the gauging station between the Upper and Lower Basins under the Colorado River Compact of 1922 (see *Arizona* v. *California*, 373 U.S. 546 (1963)). Though the San Juan River Basin is by no means the largest contributing source, its proper administration with relation to other Colorado contributor tributaries is critical in the administration of water uses on all of the streams in Colorado naturally draining to Lee Ferry.

7 proceedings [6] but filed therein only its claims relating to waters in the Dolores River drainage within that Division, omitting the claims which the Government had asserted in the federal court in Denver. The claims in the latter court, as well as those set forth in Water Division 7, included claims for reserved rights as well as appropriative rights under state law. Among the reserved rights claimed by the Government in Denver, are those for use in connection with Mesa Verde National Park, the Yucca House and Hovenweep National Monuments, and the San Juan National Forest.[7] Claims to appropriative rights under State law include those for Bureau of Reclamation projects and for lands administered by the Bureau of Land Management in the area. Also for itself on behalf of the Indian tribes, the United States claimed reserved rights for use in connection with the Ute Mountain Ute and Southern Ute Indian Reservations. The extent and location of all of these claims, however, are totally undefined in the complaint and thus their potential impact on other water users of the area is unclear.

As above noted, the Government is presently participating fully in Water Divisions 4, 5 and 6, as well as in

[6] Both petitions for certiorari and the Government's brief in opposition did not mention this service. The January 3, 1973 date referred to therein was the date of service pursuant to Fed. R. Civ. P. 4(d)(4) which was accomplished upon the U.S. Attorney in Denver, and again upon the Attorney General in Washington, D.C. Service included copies of the resumes of claims filed in Water Division 7 during November 1972. See A. 2-5.

[7] Included as a part of the U.S. claims in the state water court proceeding in Water Division 7 are those made in connection with that part of the San Juan National Forest in the Dolores River drainage. Thus the Governmeint proposes to split the adjudication of claims in connection with that Forest between the water court in Water Division 7 and the federal court in Denver.

former Water Districts 36, 37, 51 and 52, pursuant to this Court's unanimous opinions in *Eagle County* and *Water Division 5* holding that § 666 subjected *all* federal claims, including those to reserved rights, to state proceedings. The Government's claims to water rights in those pending state proceedings are identical in nature to the claims now being made by the Government in the federal district court in Denver, save only that the claims in that court include claims for the two Indian reservations.

Upon reviewing all of these circumstances the federal district court in Denver granted a motion to dismiss, finding that Colorado had a well defined, workable system for water adjudication; that the Government under the McCarran Amendment was not immune from suit; that the Government was pursuing all of its claims in Water Divisions 4, 5 and 6 and had been served in 7; and that while § 666, *Eagle County* and *Water Division 5* might not require exclusive jurisdiction in state courts (Pet. App. 19a):

> . . . they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The district court was further concerned with the dual system of decrees which would result and the possibility of conflicts eventually requiring additional litigation; the unreasonable burden on the some 1000 citizens who have proximity to the state court but not to the federal court in Denver; saw the state court as having the same obligation to enforce federal law as well as having a considerable expertise in questions

of water law which had been a hundred years in development; and concluded that federal jurisdiction should be withheld on the principles of abstention and of comity (Pet. App. 20a-21a):

> . . . [as the state forum] can fully and adequately adjudicate the issues, . . . be they the national forests, the Indian tribes, or any other individual litigants. To this end the court is granting the defendants' Motion to Dismiss.

The Government appealed to the Tenth Circuit. That court characterized the primary issue as whether ". . . the District Court was correct in its abstention stance" (Pet. App. 4a, 9a), and reversed, saying *inter alia* that various factors to be weighed in the "abstention scale" (Pet. App. 12a) did not favor the application of the doctrine and that this Court had not held or even suggested in *Eagle County* and *Water Division 5* that abstention be ordered.[8]

Petitions for writs of certiorari were filed with this Court on January 30, 1975 (No. 74-940) and February 1, 1975 (No. 74-949). Certiorari was granted and the cases consolidated on April 28, 1975 (A. 30). Petitioners are presenting their arguments jointly in this single brief.

SUMMARY OF ARGUMENT

I.

The district court, recognizing the impracticality of trying the suit brought by the United States, invoked the doctrines of abstention and comity to remit the Government to the ongoing state proceeding for the determination of its claims to the use of water, along

[8] Abstention was never an issue in those cases.

with the adjudication of the rights of all other claimants. It would be difficult to find a more fitting situation for the application of abstention and comity in the sound discretion of the district judge. The special circumstances required to permit invocation of these doctrines are here in abundance. The avoidance of duplicative proceedings in two courts presiding simultaneously over one resource; the importance of water to Colorado and the maintenance of its unified water right determination and administration system; the nature of federalism; and the wise utilization of judicial resources, all compel use of the abstention and comity doctrines. The court of appeals, without any discussion of comity and without finding any abuse of discretion in the application of abstention simply substituted its own view that the Government should be permitted to pursue its claims in the district court. In the face of all of the circumstances which are present we think this was indiscretion.

II.

This case, as did both *Eagle County* and *Water Division 5*, concerns itself solely with the question of what forum should hear and determine the whole community of claims to water. Questions of the doctrine of implied reservation of waters and their extent and purpose are not involved. This Court, upon reviewing the exhaustive treatment of the legislative history of § 666 presented to it in *Eagle County* and *Water Division 5*, rejected the Government's position that *all* claims to the use of water were not to be included in the state proceedings, and found that § 666 made no exceptions. Indeed, in the latter case this Court considered the state adjudicatory procedures in Colorado

under its 1969 Act as continuous and ongoing, and open to the consideration of all claims, including those of the United States from whatever source derived. To now separate out the claims here involved for adjudication in federal court would effectively veto § 666 and negate the salutary results of *Eagle County* and *Water Division 5*.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE DOCTRINES OF ABSTENTION AND COMITY IN DISMISSING THE COMPLAINT.

A. The Special Circumstances Which Call for the Application of Abstention Are Here in Abundance.

The doctrine of abstention, by which a federal court declines jurisdiction in order that a state forum may first resolve a controversy, could find no better set of circumstances for application than exist here. The district court correctly ascertained the multitude of special circumstances which not only make abstention appropriate but would make the assumption of jurisdiction unwise. This Court has regularly sustained the discretionary exercise of abstention in clearly analogous situations.

The abstention doctrine was first expressly articulated in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941) and the general rationale announced by the Court there is highly applicable here (at 500-501):

> . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of state governments" and for the smooth working of the federal judiciary.
>
> * * *
>
> . . . In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943) broadened the doctrine and is particularly analogous to the circumstances of this case. There, the district court's dismissal of the complaint was upheld on the ground that the issues involved a specialized aspect of a complicated regulatory system which should be left to the expertise of state administrators and courts. The opinion noted the importance of the natural resources involved to the state, the complexity of the legal issues, the capabilities of the Texas adjudicatory system, the value in a unified method of determining cases, a sound respect for the independence of state action, and the avoidance of federal-state conflict. All of these matters are present here, and were integral factors in the district court's decision.

The Colorado courts should be allowed the primary opportunity to resolve the questions pertaining to the integration of any federal rights within the state appropriative system. The integration of federal claims to the use of water into the Colorado system is simply ". . . one more item in a continuous series of adjustments" which the state system should be left free to handle. *Burford, supra* at 332, citing *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U.S.

573, 584 (1940). Unless the Colorado courts are given this opportunity, this Court's findings in 1971 in *Eagle County* and *Water Division 5* of jurisdiction in Colorado's courts to determine the federal water claims will be circumvented.

Those 1971 opinions in our view leave no doubt as to the interrelated nature of rights to the use of water. The adjudication and administration of a water right relates to all rights claimed in a common source of supply. The crucial concern in such proceedings is the relative priorities of the users. In Colorado, this interdependency has led to the adjudication and administration of water rights on a continuing basis in special water courts which also determine changes in use, alteration and transfer of diversion points, waste and nonbeneficial uses and abandonment. This interrelationship was of course recognized in the McCarran Amendment which not only permits the joinder of the United States for the adjudication of water rights but also for their administration. This legislation was a practical solution to a potentially chaotic situation.

The avoidance of friction between the federal judiciary and state regulatory entities has often been declared to be a proper basis for the application of abstention as it was recently, for example, in *Allegheny Airlines* v. *Pennsylvania Public Utilities Commission,* 465 F.2d 237, 243 (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973):

> . . . [T]he primary concern running through the cases in which the Court has abstained for equitable purposes seems to be the possibility of friction caused by the interference with the orderly procedures and rules of state *regulatory bodies.* (Emphasis in original.)

See also Gay v. *Board of Registration Commissioners,* 466 F.2d 879 (6th Cir. 1972).

The court below did recognize that under the rationale of *Burford* federal courts should abstain where the assumption of jurisdiction would unduly interfere with a state regulatory scheme. However, without explanation, the court concluded that (Pet. App. 11a):

> Here the federal court is not shortcircuiting or interfering with the efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

In truth, the interference would be significant and of great injury to the present Colorado regulatory scheme. After a century of experience and refinement, Colorado's water right system skillfully and comprehensively adjudicates and administrates rights to the use of this scarce resource. As the district court declared (Pet. App. 20a):

> . . . the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.[9]

The complaint of the United States seeks an independent adjudication of federal water claims and the

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[9] See also *Railroad Commission of Texas* v. *Rowan & Nichols,* 311 U.S. 570, 575 (1941) where this Court noted that a local regulatory agency ". . . equipped to deal with everchanging aspects possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals."

appointment of a federal water master to determine water rights in a water source presently administered by state officers and state water courts. The relief sought portends chaos: both state and federal courts as well as water administrators will be confronted with the same questions concerning water uses; the day to day adjustments necessary in the administration of waters will be confused and perhaps impossible; the myriad of post-decree problems such as changes in use, plans of augmentation, and abandonments will become complicated and oppressive to the parties involved. The potential quagmire of dual adjudication and administration clearly calls for the application of *Burford, supra,* and thus the dismissal of the federal suit. When a federal right is so enmeshed in a state scheme of regulation, considerations of common sense as well as federalism point to abstention as the practical solution.

Indeed, the practicalities of the situation were repeatedly adverted to by the district court in its invocation of abstention. For example (Pet. App. 19a-20a):

> . . . deferral of jurisdiction to state courts is justified when, *as a practical matter,* retention of federal jurisdiction would result in a piecemeal solution of a larger problem.
>
> The court perceives *a practical approach* in this case. Aside from the strict legal interpretations, the court envisions that *a practical approach* must be recognized that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are *practical* impediments to requiring everyone in this particular area to litigate the matter in the federal courts. (Emphasis supplied.)

These and other practical concerns noted by the district court and the appropriateness of avoiding federal-state conflict have frequently been voiced by this Court, as in *Public Service Commission of Utah* v. *Wycoff,* 344 U.S. 237, 247-48 (1952):

> . . . State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. . . .
>
> * * *
>
> . . . State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

Despite its statement to the contrary, the circuit court has "shortcircuited" the regulatory system of Colorado by ordering the continuance of a suit which will clearly circumvent the state's adjudicatory and administrative framework.

In addition, Colorado's historic concern with water should certainly bear some weight in the abstention scale. Water is intimately tied to the history as well as the future of the state. Where a natural resource is of such significance, this Court has found the requisite special circumstances, *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U.S. 593, 594 (1968):

> The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State

> of New Mexico, where water is one of the most valuable natural resources . . . . Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

The result was similar in *Reetz* v. *Bozanich,* 397 U.S. 82, 87 (1970), where fish resources were declared to be of great concern to Alaska; in *Burford, supra,* where oil and gas were recognized as of paramount importance to Texas; and should be the same here.

Furthermore, abstention is supported by concern for sound judicial administration. Parallel proceedings and dual jurisdiction over a single source of water would be an anomaly in a era of serious concern about overburdened court dockets. "Abstention is variously recognized . . . (4) to ease the congestion of the federal court docket." Wright, Law of Federal Courts 196, § 52 (2d Ed, 1970). Water right adjudications can be lengthy and complex. Protracted litigation in a court geographically remote from the subject matter and from the vast majority of defendants will obviously encumber the local federal court resources and burden a substantial citizenry left to wonder about such a clear duplication of the pending state proceeding which, being truly comprehensive while the federal suit is not, must go forward in any event.

The abundance of special circumstances calling for abstention here make the district court's discretionary determination unassailable. The avoidance of federal-state friction, the complexity of the subject matter, the existence of an expert state regulatory scheme, the cardinal significance of water to Colorado, the pres-

ence of a parallel state case, the potential adverse practical consequences of dual proceedings and the needless use of federal judicial resources all decidedly press for the invocation of abstention.

B. Comity Was Also a Proper Basis for Declining Jurisdiction and Should Have Been Considered by the Court Below.

The court below, while recognizing that the federal district court partially based its decision on the grounds of comity, failed to discuss comity at all.

This Court articulated the notion of comity in *Younger* v. *Harris,* 401 U.S. 37, at 44 (1971) as:

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

This Court went on to note that the principle of federalism, which lies at the heart of this controversy, established (*id*):

> . . . a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Comity may be realized through the exercise of abstention in situations where declining to take jurisdiction will promote our federal system. The policy of comity is particularly vital in preserving concord-

ance between federal and state forums and avoiding potential conflicts between the respective spheres. As this Court stated in *Great Lakes Dredge & Dock* v. *Huffman,* 319 U.S. 293, 298 (1943):

> . . . courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

The district court, in arriving at its decision to grant the defendant's motion to dismiss, correctly applied the doctrine of comity by recognizing the historic practice of state water adjudications and the ongoing nature of such proceedings. As we have noted, however, the circuit, even while recognizing that the district court's action included "reasons of comity" (Pet. App. 4a) did not address itself to this vital principle at all. Had it done so we submit that it would have perceived that the principle was developed for application to situations exactly like this one where sensitivity to state policies is desirable and cooperative judicial federalism may be advanced.

The recent decision of this Court in *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975), reiterated the commanding role of comity in maintaining federal-state judicial balance and harmony (at 602):

> The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence.

This statement in *Huffman* makes it abundantly clear that comity is proper where "Federal adjudication of

the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the state's own adjudicative process." *Lynch* v. *Snepp,* 472 F.2d 769, 774 (4th Cir., 1973). This Court cited *Lynch* in its recent decision in *Huffman* noting (at 607):

> Informed by relevant principles of comity and federalism, three courts of appeals have applied *Younger* when pending state proceedings were civil in nature. [Also citing *Duke* v. *Texas,* 477 F.2d 244 (C.A.5, 1973) and *Cousins* v. *Wigoda,* 463 F.2d 603 (C.A.7, 1972).]

This approach is fully warranted in our case, where here, as in *Lynch,* the district court emphasized the futility of dual litigation, a concern over the crowded dockets of the federal courts and the spirit of federal-state comity.

Indeed, in *General Investment and Service Corp.* v. *Wichita Water Co.,* 236 F.2d 464 (1956) the Tenth Circuit itself recognized the efficacy of comity in terms of real applicability here, as follows (at 468):

> . . . The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. . . .

Had the circuit reviewed the action of the district court here utilizing those announced guidelines, the district court should certainly have been sustained.

Despite the Government's assertion to the contrary, the fact that it filed in the U.S. District Court before

being served in Water Division 7 does not diminish the force of comity. This Court ruled, in *Pennsylvania* v. *Williams*, 294 U.S. 176, 184 (1934), that even where the state court has not previously asserted its jurisdiction, it is proper for a district court to abstain to state administrative process, which is "charged by the statutes of the state with the duty of supervising . . ." the matter in question.[10] The court below, however, found that the Government, as the first filer, had the right to have the case tried in federal court despite the pendency of the state proceeding. This Court recently rejected this view in *Hicks* v. *Miranda,* 422 U.S. —— (43 U.S.L.W. 4857, 4862) stating:

> . . . Neither *Steffel* v. *Thompson,* 415 US. 542, nor any other case in this Court had held that for *Younger* v. *Harris* to apply the state criminal proceedings must be pending on the day the federal case is filed.

While we recognize that *Huffman* concerned an attempt to have the federal courts decide a question of the constitutionality of a state nuisance statute, and *Hicks* involved constitutional questions in a criminal action, we think the general principles guiding the application of the comity doctrine enunciated in these cases have equal force here. Although this Court did not use the terms of abstention and comity in the early case of *Pacific Live Stock Co.* v. *Oregon Water*

[10] Citing that decision, it has been held that:

> ". . . federal jurisdiction must be relinquished to the state court, *even where jurisdiction attaches later in point of time than does the federal,* in cases such as this, where the matter is peculiarly within the province and duty of the state, its officers or courts." *Hutchins* v. *Pacific Mut. Life Ins. Co. of California,* 20 F. Supp. 150, 152 (S.D. Cal., 1937) (Emphasis supplied).

Board, 241 U.S. 440 (1916), that case involved much the same situation as presented below and there this Court found that even where two suits to determine water rights had been first initiated in a federal district court, the judge properly remanded the action to the state body, citing to the efficacy of state proceedings as avoiding "long and vexatious controversies."[11] The same result should obtain here.

Thus, whatever value may attach to the making of a filing some several weeks in advance in one forum as opposed to another, it should not be held to subvert the overriding concerns which are present here and which clearly sustain the application of comity by the district court.

C. Invocation of the Principles of Abstention and Comity Are Within the Sound Discretion of the Trial Judge and Absent a Show of Serious Abuse, May Not Be Overturned.

Although no longer limited to equity cases, the doctrine of abstention is based upon equitable considerations. It ". . . involves a discretionary exercise of the court's equity powers." *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964). In *Burford, supra* (at 317-18) this Court emphasized the discretion of the lower court in the context of abstention:

> . . . a federal equity court . . . may, in its *sound discretion,* . . . "refuse to enforce or protect legal rights, the exercise of which may be prejudicial

[11] *Pacific Live Stock Co.* v. *John H. Lewis, James T. Chinnock and George T. Cochran, Constituting the State Water Board of the State of Oregon, et al,* 241 U.S. 440, 449 (1916) was utilized by the Senate Judiciary Committee in its consideration of proposed legislation which led to the enactment of the McCarran Amendment (43 U.S.C. 666) and is discussed in that context in Part II A of this brief, *infra,* pp. 25-28.

> to the public interest"[4], for it "is in the public interest that federal courts of equity should exercise *their discretionary power* with proper regard for the rightful independence of state governments in carrying out their domestic policy"[5]. (Emphasis supplied.)

[4] *United States ex rel. Greathouse* v. *Dern,* 289 U.S. 352, 360 (1933).

[5] *Pennsylvania* v. *Williams,* 294 U.S. 176, 185 (1934). . . .

See also, *Meredith* v. *Winter Haven,* 320 U.S. 228 (1943).

The Government has argued that where federal courts have jurisdiction, it is their duty to exercise it. "But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised . . ." *Alabama Public Service Com.* v. *Southern R. Co.,* 341 U.S. 341, 345 (1951). The Court has stated: ". . . courts of equity should exercise their *discretionary* power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* at 298 (emphasis supplied); *see also Railroad Com. of Texas* v. *Pullman, supra.*

As this Court observed in *Lemon* v. *Kurtzman,* 411 U.S. 192, 200 (1973):

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary,[2] what is fair, and what is workable.[12]

These fundamental principles relating to appellate review as well as to the function of the lower court to produce a fair and workable result would indicate that the trial court can best determine the applicability of the principles of abstention and comity to a given case. At the very threshold of the proceeding the factors of federalism, the extent of interference with state processes, the importance of the subject matter to the state, the capabilities of the state proceeding, the effects of denying a federal forum, and the burden on the judicial resources of the court can all be weighed. The deference to be given the trial court's decision on abstention was underscored by the Court in *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U.S. 25, 29-30 (1959):

> . . . Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may be safely vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.
>
> * * *
>
> . . . In providing on his own motion for a stay in this case, an experienced district judge was responding in a sensible way to a quandary . . .
>
> * * *
>
> . . . the district judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana . . .

The exercise of discretion by the trial judge in the present case should have been given like deference.

The court of appeals made no finding of an abuse of discretion. Rather, it simply substituted its own discretion for that of the district court. In particular, its failure to discuss comity at all reflects its action of not reviewing but simply rejecting the district court's dis-

[12] Citation and footnote omitted.

cretion in favor of its own. The result was an overly narrow, overly technical viewpoint which does not come to grips with the circumstances which led to the fair and practical result in the district court. The result in the latter court should be given effect by reversal of the opinion below.

II. CONGRESS INTENDED THROUGH THE McCARRAN AMENDMENT THAT GENERAL WATER RIGHTS ADJUDICATIONS, AS HERE, BE CONDUCTED BY STATE TRIBUNALS, WHICH HAVE JURISDICTION OVER ALL CLAIMS OF THE UNITED STATES AS DECLARED IN EAGLE COUNTY AND WATER DIVISION 5.

A. The Intent of McCarran as Declared in Eagle County and Water Division 5.

The legislative history of the McCarran Amendment, so fully set out for this Court's consideration in the briefs presented in the *Eagle County* and *Water Division 5* litigation, leaves no room for doubt that passage of that legislation resulted from, and was intended to correct, the confusion, conflicts and inequities arising from the refusal of the United States to submit jurisdictionally to state proceedings in water matters. After some three years of consideration, the Congress elected to waive sovereign immunity to suit against the United States in such cases. The waiver of immunity was clear and unambiguous, extending to *all* of the Government's claims to the use of water as this Court found in *Eagle County* in disposing of the argument that reserved rights were not intended to be included (401 U.S. at 524):

> . . . for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) has no exceptions and which, as we read it, includes

> appropriative rights, riparian rights, and reserved rights.[13]

The Court then went on to distinguish such adjudications from those in cases like *Dugan* v. *Rank*, 372 U.S. 609 (1963) stating that in an adjudication proceeding such as the one involved in *Eagle County* (at 525):

> . . . The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill, said in reply to Senator Magnuson:[4] "S.18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."
>
> * * *

[4] S. Rep. No. 755, 82 Cong., 1st Sess., 9. And see *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 448.

[13] The legislative history shows that the Justice and Interior Departments opposed the legislation claiming that the general waiver of immunity ". . . would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions and the joinder of the United States in many actions in all of which it would be required to claim every right which it could conceivably have or need . . ." See Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951) at 66-67. The representative of the Attorney General made it clear at the hearings on S.18 that the proposed legislation would embrace *all* manner of claims to water rights on behalf of the United States, including claims for reclamation, Indian, Defense, forest and soil conservation purposes. See e.g. Hearings, *supra* at 6, 7.

Similarly, in *Water Division 5,* where water proceedings under Colorado's new 1969 Act were in issue, this Court said (at 529-530):

> . . . The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review.

This Court thus recognized the 1969 Act as establishing a continuing process whereby claims of all parties may be determined in relation to others using water from the same source. Those proceedings are continuously open to all those having claims to the use of water within the State, including of course the United States.

The above-noted citation by this Court in *Eagle County* to *Pacific Live Stock* v. *Oregon Water Bd.,* 241 U.S. 440 (1916) is of particular significance in the circumstances of the case presented here. In *Pacific Live Stock* this Court discussed fully what Mr. Justice Douglas characterized in *Eagle County* as the "whole community of claims".[14] But further, in the process

[14] See *Pacific Live Stock,* 241 U.S. at 447-48:

> . . . Unlike [merely private suits brought to restrain alleged encroachments upon the plaintiff's water rights], the proceeding in question is a quasi public proceeding set in motion by a public agency of the state. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceedings. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first that the waters may be distributed, under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights

the Court upheld a federal district court remand to the state water board of proceedings which the plaintiff had sought to remove to the federal district court, in which he had instituted suit before the state proceedings had commenced. This Court said that the rule that the court where the suit is first brought should retain jurisdiction did not apply to defeat a general water adjudication in favor of the more restrictive suit brought by the plaintiff in the federal court to determine water rights.[15]

In the light of *Pacific Live Stock* there is a strong case for upholding the exercise of discretion by the district court to abstain in this case, quite apart from the subsequent McCarran Amendment and this Court's application of that statute in *Eagle County* and *Water Division 5.* With the addition of McCarran, and the teaching of *Eagle County* and *Water Division 5,* the case becomes overwhelming. In considering § 666 the Senate Judiciary Committee quoted from this Court in *Pacific Live Stock* to describe state water adjudicatory proceedings.[16] Now, not only the subject mat-

> of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

[15] *Pacific Live Stock* at 447. To the same effect on removal and remand see *In re Green River Drainage Area,* 147 F.Supp. 127 (D. Utah 1956) and *Four Counties Water Users Assn.* v. *Colorado River Water Conservation District and the United States of America,* Civ. No. 8880, District Court of Colorado, Chilson, J. 4/12/65 unreported but contained in the record below in these proceedings at R.259.

[16] S. Rep. No. 755, 82d Cong., 1st Sess., 5. The quoted portion, taken from 241 U.S. 447-448, is included in the quote shown in fn. 2, *supra.*

ter of that case but the factual circumstances there are directly in point. For the reasons given in this Court's reading of McCarran in *Eagle County* and *Water Division 5,* the *Pacific Live Stock* result should be reached here.

B. The Procedural Relationship Between the State and Federal Statutes.

With specific reference to the pending proceedings in Water Division 7, it may be noted that in response to a motion to and an order of the Water Court for Water Division 7, service on the Attorney General of the United States of the resumé of all claims filed in that Water Court in November, 1972, was made on December 22, 1972, in accordance with the McCarran Amendment (A. 2-4). Service was also made in accordance with the Federal Rules of Civil Procedure on the United States Attorney and again on the Attorney General on January 3, 1973 (A. 5).[17]

[17] The circuit made a footnote reference to this matter after its opinion had issued but before any action on rehearing. See opinion below at Pet. App. 3a. The Jan. 3, 1973 service date was mentioned in an *ex parte* letter from the Government to the Clerk of the circuit dated October 30, 1973 (A. 24) which, however, concerned itself mostly with the Government's views of the 1969 Act. The letter construes the 1969 Act erroneously and illustrates the apparent continuing misapprehension of the Government as to the ongoing nature of adjudications under the 1969 Act. This lack of comprehension is further evident in the Brief in Opposition at the point where the Government discusses service, stating (Opp. p. 4, fn. 2):

> . . . Apparently, while there were periodical adjudications of particular claims to water in state court, no general stream adjudication had been undertaken as to the San Juan River System nor was the United States served notice of any action prior to January 3, 1973.

The statement concerning no general adjudication, in the light of the ongoing proceedings in Water Division 7, is patently in error.

(fn. cont. next page).

The United States from its participation in the proceedings in Water Divisions 4, 5 and 6, had to be aware of the ongoing proceedings in Water Division 7, which had been open at least since the issuance of a resumé of claims in October 1970. After the clear decisions in 1971 in *Eagle County* and *Water Division 5,* the Government should have availed itself of those ongoing state proceedings for the determination of its claims for water in Water Division 7.[18] At the least, when served in December 1972 with the November resumé, the Government should have filed all of its claims from whatever source derived as it is clearly required to do by the second sentence of the McCarran Amendment:

> . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

This language leaves no room for doubt that once the Government had been served under McCarran, if

So is the statement about no service prior to January 3, 1973, but we do agree with the footnoted conclusion of the circuit that the date involved "is not outcome determinative" for the reasons noted in our discussion of *Pacific Live Stock* and other cases holding that the court of first filing need not retain jurisdiction.

[18] In this connection the district court, quite apart from whether the Government had been served, noted in its opinion (Pet. App. 19a): ". . . the United States, as it is presently doing in other water rights suits in the state courts of Colorado. . . *should initiate* action in the appropriate state court." (emphasis added).

not before, the State proceedings established under the 1969 Act were to be complied with to their full extent. The arguments by the United States that these proceedings do not constitute a general adjudication for *all* water rights were fully considered and rejected in *Water Division 5* (at 529). In addition, "the administration of such rights", in § 666(a)(2), which is so clearly implemented by the second sentence of McCarran, was emphasized by this Court in *Eagle County* (at 524) as referring to rights which were all inconclusive and encompassing appropriative, riparian and reserved rights.

Thus the State proceedings should not have been avoided in the first place through the separate filing made by the Government in the district court; nor should they have been circumvented after service by a partial filing so that claims of an identical nature to the water resources within the Division were pending in two courts. This not only contravenes the plain language of the statute, but leads directly to the vice which the Congress foresaw and tried to preclude, namely a ". . . subsequent decree . . . of little value" unless all claimants are present. The circuit clearly recognized this when it said of McCarran (Pet. App. 7a):

> . . . The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States . . . .

but failed to permit the implementation of this purpose by reversing the district court. This Court should act to correct this result.

C. Only the State Proceedings Will Avoid Piecemeal Results and Produce a Fully Effective Decree.

As we have noted, one of the concerns of the district judge was that ". . . as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem." (Pet. App. 19a). He indicated that he was satisfied, in the light of the McCarran Amendment and this Court's decisions in *Eagle County* and *Water Division 5,* that deferral of federal jurisdiction to state courts was justified in order to avoid a piecemeal result.

The avoidance of piecemeal litigation on water rights was, of course, the central purpose of the McCarran Amendment. It was designed to bring in the United States in order to have a complete adjudication. This was clearly perceived by this Court in *Eagle County.* This central element, while recognized by the court below (Pet. App. 7a) was given only lip service, for that court went on to construe McCarran as narrowly as it construed abstention, concluding as to McCarran ". . . that § 666 has a very limited coverage and is perhaps only procedural." (Pet. App. 9a). This view in effect adopts some of the objections of the United States at the time that § 666 was enacted, such as the assertion that this legislation would result in . . . "piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions".[19] What has happened here as a consequence of the opinion below is exactly the opposite. Thus in according McCarran "a very limited coverage" the opinion below has assured a piecemeal result as well as a multiplicity of actions. The State proceeding, as foreseen in McCarran, would clearly avoid both of these negatives.

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[19] Hearings, *supra* fn. 13.

Of perhaps even greater concern is that the course elected by the circuit will not produce a fully effective decree. For example, Colorado's system of adjudication of water rights, in addition to bringing into the proceedings all parties within the state, provides for service on the "unknown" claimants by publication (section 37-92-302(3), C.R.S. 1973, Pet. No. 74-949, 51-52). Those with rights evidenced by prior decrees may appear or not, as they are so advised, but are nonetheless bound by the results. In sharp contrast, the proceeding instituted by the United States seeks an order requiring all defendant claimants, *known* and *unknown,* to appear, and in effect re-establish their claims,[20] without recognizing that the district court has no procedure for notifying the *unknown* claimants. The complaint below also requests the appointment of a federal water master, further complicating river administration problems by establishing a duality of river regulation and control already within the water court and water officials in Water Division 7.

This Court has had before it several cases relating to the complexities of the operation of the Colorado River interstate, including *Arizona* v. *California,* 373 U.S. 546 (1963). From such litigation the Court is aware that the Congress has adopted major pieces of legislation relating to the control of the river and to the construction of various project works to permit the beneficial use of the waters of the river.[21] Use of the waters of the river as between the states themselves as

[20] Complaint, Pet. App. 36a.

[21] These include, among others, the Boulder Canyon Project Act of 1928, 45 Stat. 1057; the Colorado River Storage Project and Participating Project Act of 1956, 70 Stat. 105; and the Colorado River Basin Project Act of 1968, 82 Stat. 885.

well as between the United States and Mexico is likewise controlled by a number of compacts as well as by statutory provisions.[22] The share allotted to each state by these compacts is divided among the users within a state by the procedures existing in each state for the adjudication and administration of water. Thus, compact requirements at Lee Ferry, Arizona, involve all users or claimants of water from all of the Colorado River tributaries within Colorado including, of course, those within Water Division 7.

There are in the Colorado River drainage in Colorado, apart from the San Juan Basin and exclusive of the claims of the United States, something in excess of 10,000 water rights. Since the compacts provide no stream by stream allocation of the share of water to which Colorado users are entitled, it is evident that the effect of claims to the use of water is not confined to the tributary drainages in which the requested rights are located. Under state procedures, interested parties outside of the water division involved are also given sufficient notice by publication, are entitled to appear, and are bound by the results unless they ap-

[22] The Colorado River Compact of 1922 approved by the Congress in 1929 in the Boulder Canyon Project Act, 45 Stat. 1057, 1064 and which was declared effective by Presidential Proclamation, 46 Stat. 3000 (see also article 61 of title 37, C.R.S. 1973), apportions the total flow of the Colorado River between the Upper Basin (principally, the States of Colorado, New Mexico, Utah and Wyoming) and the Lower Basin (principally, Arizona, California and Nevada). The Upper Colorado River Basin Compact of 1948, approved by the Congress in 1949, 63 Stat. 31 (see also article 62 of title 37, C.R.S. 1973) divides the water apportioned by the 1922 Compact among the Upper Basin states. 1922 Compact contains provisions covering releases of water to Mexico, as does the Colorado River Basin Project Act of 1968, 82 Stat. 885.

pear before the limitation period expires.[23] But under the procedure chosen by the United States here the Colorado River users located in Colorado but not named will not receive notice and consequently will not be bound. If the United States is allowed to proceed with its case, the obtaining of a piecemeal water right solution which is effective against some users, but which may not be effective against others, would throw the statewide administrative mechanism into chaos.

To our knowledge, no comparable service procedures or limitation period provisions are available in federal actions. Consequently, the decree which the United States seeks to have issued by the federal district court cannot be fully effective and would necessarily result in further litigation and the multiplicity of actions Congress sought to avoid by McCarran.

Finally, the inadvisability of two procedures in this field was strongly urged by the Government itself in testifying against the proposed legislation leading to the enactment of § 666. Senator McCarran's bill as introduced contained a proviso that the United States would have the right of removal of any such suit to a federal court. As a "first point" against the bill as drafted, the spokesman for the Justice Department referred to the provision for removal to a federal court and observed:

> . . . But if this legislation as now written is enacted, you will have *two procedures* in existence in the State, and it would be a serious detriment

[23] The 1969 Act at section 37-92-304(10) C.R.S. 1973, set out at Pet. No. 74-949 at p. 55, limits the period when an adversely affected person may petition the court for redress to three years.

> to the small water user here if he were to sue the United States and we were to remove over here to the city and county of Denver, and he would have to come across the mountain to protect his rights. I don't think that is desirable at all . . . [24] (emphasis added)

In reporting the bill the Committee adopted this suggestion and eliminated the removal provision.

The suit filed here by the Government in the district court in Denver was of course not a removal.[25] It was however an attempt to avoid an established, ongoing State proceeding and resulted in two procedures which Justice itself had counselled Congress two decades before to avoid.

CONCLUSION

In sum, the aims of the McCarran Amendment may be said to be close to the aims of abstention itself. The McCarran Amendment sought to permit the adjudication of all claims to water in one proceeding; sought to avoid piecemeal litigation over a precious natural resource; sought to avoid the migration of citizens to a removed forum to defend against federal claims, while engaging in an imperfect procedure; and to avoid the disruption of a long-evolved state procedure for the administration of a vital resource. All of these goals we thought were achieved in *Eagle County* and

[24] Hearings on S. 18, *supra*, at 5.

[25] If removal is prohibited the question arises whether a direct suit is permissible.

Water Division 5, and we urge their retention through the reversal of the opinion below.

Respectfully submitted,

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